The following constitutes the order of the Court.

Signed August 31, 2005 **United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
MIRANT CORPORATION, et al.,	§	
Debtors.	§	CASE NO. 03-46590-DML-11
	§	

MIRANT CORPORATION, et al, and THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MIRANT CORPORATION,	§	
Plaintiffs,	§	
	§	
vs.	§	ADV. NO. 05-04099
	§	
THE SOUTHERN COMPANY,	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF BANKRUPTCY JUDGE

TO THE HON. JOHN H. MCBRYDE, UNITED STATES DISTRICT JUDGE:

Comes now D. Michael Lynn, Bankruptcy Judge, and makes this, his report and recommendation respecting the Motion of The Southern Company for Withdrawal of the Reference of the Adversary Proceeding and Memorandum of Law in Support Thereof (the "Motion"):

On August 24, 2005, pursuant to Rule 5011.1 of the Local Rules of Bankruptcy Procedure, I held a status conference respecting the Motion during which The Southern Company ("TSC"), Debtors and the Official Committee of Unsecured Creditors of Mirant Corporation (the "Committee") presented argument. I have also carefully reviewed the Motion, Debtors' and the Committee's joint response thereto (the "Response"), the authorities cited in the Motion and Response and authorities discussed at the status conference.[1] Based on all of these resources, I recommend that the Motion be denied.

I. TSC's Role in Debtors' Cases

Before addressing the specific factors the Court of Appeals has directed be considered in determining whether to withdraw the reference,[2] I believe it necessary to apprise the District Court of TSC's conduct in the underlying chapter 11 cases. It is appropriate that TSC's active participation in Debtor's cases be considered in connection with the Motion. In deciding not to withdraw the reference in an adversary proceeding involving facts similar to those alleged in the case at bar, the United States District Court for the Southern District of New York stated:

> Motorola [the defendant seeking withdrawal] is intimately involved with [the bankruptcy proceedings of [the debtors]. Motorola has filed several proofs of claim, several claims for administrative expenses, and a claim for setoff . . . . Unlike [in Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) and Orion Pictures Corp. v. Showtime Networks, 4 F.3d 1095 (2d Cir. 1993)], Motorola has not been "involuntarily subjected to having the debtor's state law claims against it decided by an Article I judge."

Statutory Committee of Unsecured Creditors v. Motorola, Inc. (*In re* Iridium Operating,

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1 I understand TSC filed a reply to the Response less than 24 hours before the status conference. Although, I have reviewed that document, I did so after the status conference and will not refer to it in this report. I would not change my report, recommendation or analysis based on the Reply's contents.

2 *See* Holland America Ins. Co. v. Succession of Roy, 777 F.2d 992 (5th Cir. 1985).

LLC), 285 B.R. 822, 834 (S.D.N.Y. 2002), quoting S.G. Phillips Constructors, Inc. v. City of Burlington, Vermont (*In re* S.G. Phillips Constructors, Inc.), 45 F.3d 702 (2d Cir. 1995). *See also* Enron Power Mktg., Inc. v. Nev. Power Co., No. 01-16034(AJG), 2004 U.S. Dist. LEXIS 25999, at *17 (S.D.N.Y. Dec. 23, 2004) (court denied permissive withdrawal of reference in part because of the defendant creditor's active participation in the bankruptcy case by filing proofs of claim, counterclaims, and setoffs).

TSC has been very active in Debtors' chapter 11 cases. Besides filing numerous claims, as detailed in the Response, TSC has, *inter alia*:

(1) formally appeared in more than 70 hearings before the bankruptcy court;

(2) participated in negotiation of a joint agreement with Debtors and the Internal Revenue Service that benefited TSC by eliminating potential recapture claims against it[3] (see Motion of the Debtors for Entry of an Order Pursuant to 11 U.S.C. §§105(a) and 363(b)(1)(I) Authorizing the Debtors to Enter into that Certain Closing Agreement on a Final Determination between [sic] Mirant Corporation, The Southern Company, and the Internal Revenue Service and (II) Granting Related Relief, filed February 25, 2005; Transcript of Proceedings, March 23, 2005, p. 19, ll. 1-21);

(3) participated actively in hearings on global procedures for claims resolution and estimation, even filing a formal objection on October 1, 2004, to Debtors' motion to establish procedures;

(4) filed a pleading on April 1, 2005, to preserve its right to dispute the bankruptcy court's valuation of Debtors (see Notice and Objection of The Southern Company Regarding

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[3] The compromise was justified in part based on avoidance of accrual of taxes as to which TSC was to be indemnified by Debtors. The indemnity claim thus affected is among the claims TSC has filed.

Collateral Estoppel or Res Judicata Effect of Valuation Findings[4]);

(5) taken advantage of its status as a party in interest (11 U.S.C. §1109) by participating in hearings on Debtors' and the Committee's discovery directed to other parties (e.g., see Objection to 2004 Examination, filed by TSC May 24, 2005); and

(6) sought the bankruptcy court's assistance in obtaining some say over the form and content of tolling agreements entered into by Debtors and the Committee with other potential defendants (see TSC's objection filed June 27, 2005; Transcript of Proceedings on June 30, 2005, pp. 70, *et seq.*).

Perhaps most significantly, TSC has acted in a fashion inconsistent with the relief sought in the Motion. Litigation against TSC has been recognized since early in these chapter 11 cases as a potentially important asset of Debtors' bankruptcy estates. The bankruptcy court has repeatedly expressed concern that this potential litigation be properly administered, not only because of the potential of a recovery for the benefit of creditors but also because there must be no public perception that the investigation of the spinoff of Debtors by TSC (less than two years before Debtors recognized the need to restructure their debt) was inadequate.[5] As the statutes of limitations for voidable transfers (11 U.S.C. §546(a)) and some prepetition causes of action (11 U.S.C. §108) approached, prompted by a report filed by the Examiner appointed in these cases, the

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[4] Commencing April 18, 2005, the bankruptcy court conducted a 27 day hearing on valuation of Debtors. Although TSC did not formally appear or participate in that hearing, counsel representing TSC observed the entire hearing.

[5] *See In re* Mirant Corp., 326 B.R. 354, 356 (Bankr. N.D. Tex. 2005); *In re* Mirant Corp., 326 B.R. 646, 654-55 (Bankr. N.D. Tex. 2005).

bankruptcy court raised the issue of whether Debtors or another party should investigate and pursue litigation against TSC. See Transcript of Proceedings, February 23, 2005, p.7, et seq. At that time counsel for TSC objected to any proceedings at which the standing issue would be addressed in which TSC could not participate.[6] See Transcript of Proceedings, February 23, 2005, pp. 9 et seq. As a result, on March 1, 2005, I sent a letter (a copy of which is appended hereto) to TSC's (then) lead counsel advising that the standing issue would be referred to the Hon. Steven Felsenthal, noting, "if I am to try any of the [claims against TSC], I do not believe it would be appropriate for me to preside over any hearing that would affect investigation or control of [the c]laims . . . . I believe Judge Felsenthal's involvement [will avoid risk] to my impartiality."

TSC thereafter participated in hearings before Judge Felsenthal. TSC, thus, in its capacity as a party in interest, was in the novel position of helping to choose its prospective adverse plaintiff. *See also*, TSC's objection, filed June 23, 2005, to the Committee's motion to assert Debtors' causes of action.

There can be no question that TSC understood that the bankruptcy court referred the standing issue to Judge Felsenthal in contemplation of hearing any resulting adversary proceeding filed against TSC. It is equally clear (as TSC effectively acknowledged on August 24 during the status conference) that TSC knew at least the general nature of the causes of action that were contemplated against it. Yet, on February 23 (and after my March 1 letter), TSC did not raise the possibility it would demand a jury trial nor indicate

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[6] As litigation strategy could be a consideration in deciding whether Debtors should serve as estate representative in a suit against TSC, there was always a possibility that deciding the standing issue would require hearings from which TSC was excluded.

that it would have a problem with defending itself before the bankruptcy court.[7] I am not prepared to suggest that TSC has manipulated the court system, or even that the Motion was the result of a change in counsel and a dislike of the bankruptcy court resulting from an opinion issued by it ruling against TSC.[8] However, the Motion is clearly not consistent with TSC's repeated[9] invocation of the bankruptcy court's equitable powers, let alone TSC's conduct respecting the standing issue. Withdrawal of the reference, given these facts, might encourage manipulation of bankruptcy jurisdictional options in other cases.

II. Factors

Even absent any effect on TSC's entitlement to withdrawal of the reference from its active role and conduct in the underlying chapter 11 cases, withdrawal is not justified by application of the *Holland* factors. The *Holland* factors are: (1) whether the matter involves core, non-core, or mixed issues; (2) whether or not there has been a jury demand; (3) the effect of withdrawal on judicial economy; (4) reduction in forum shopping; (5) uniformity in bankruptcy administration; (6) fostering the economical use

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7 If TSC had contemplated the Motion as of my March 1 letter, TSC should have so advised the court. TSC, however, did not indicate it might seek to have any adversary against it heard in another court. Given TSC's filed claims, it was reasonable for other parties and the court to infer that TSC would have no objection to bankruptcy court jurisdiction.

8 TSC brought in Jones Day to represent it in the adversary shortly after issuance of *In re* Mirant, 336 B.R. 646 (Bankr. N.D. Tex. 2005) (denying TSC the ability to assert attorney-client privilege with respect to Troutman Sanders, LLP's joint representation of Debtors and TSC). Prior to that time Fulbright & Jaworski, L.L.P. served TSC generally.

9 The catalog given here of TSC's participation in Debtors' chapter 11 cases is not intended to be complete. I have not reviewed transcripts or filings by TSC during approximately the first year of these chapter 11 cases.

of the debtor's and creditor's resources; and (7) expediting the bankruptcy process. (Holland, 777 F.2d at 998-99).

A. Core v. Non-Core

The first factor in the *Holland* analysis is whether the causes of action asserted against TSC in the Complaint[10]) are or are not core proceedings. Though not dispositive of the second factor (entitlement to a jury trial),[11] a cause of action, which in another context might warrant a jury trial, may be heard by the bankruptcy court if it is core.[12]

TSC admits that, of six counts in the complaint, three (I, V and VI) are core. Count I, in which plaintiffs seek recovery of transfers alleged to be fraudulent, is clearly core under 28 U.S.C. § 157(b)(2)(H). Count I also constitutes a counterclaim (28 U.S.C. §157(b)(2)(C)) and is implicated by 11 U.S.C. §502(d) in the bankruptcy court's jurisdiction to allow and disallow claims. See *In re* Baudoin, 981 F.2d 736, 741 (5th Cir. 1993); *In re* Efficient Solutions, No. 00-3071, 2000 U.S. Dist. LEXIS 18794, at *13-14 (E.D. La. Dec. 20, 2000).

Count V (objection to TSC's claims) and Count VI (equitable subordination of TSC's claims) also are clearly core proceedings. It is a central function of the bankruptcy court to hear

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10 Debtors and Committee filed their original complaint on June 16, 2005, and an amended version on July 6, 2005. The differences are not relevant to this discussion, and I will simply refer to the Complaint.

11 *See* Granfinanciera v. Norberg, 492 U.S. 33, 36, 57-58 (1989); *In re* Clay, 35 F.3d 190, 191 (5th Cir. 1994).

12 *See* McFarland v. Leyh (*In re* Texas Gen. Petroleum Corp.), 52 F.3d 1330, 1337 (5th Cir. 1995) (stating that the existence of a creditor's right to a trial by jury on a fraudulent conveyance claim did not necessitate a finding that the bankruptcy court lacked jurisdiction); *In re* Lapeyre, No. 99-1312, 1999 U.S. Dist. LEXIS 10725, at *13 (E.D.La. July 7, 1999) (court indicating that the right to a jury trial alone is not sufficient to justify withdrawing the reference of a core proceeding where other factors favor trial by the bankruptcy court).

and determine claims against a debtor's estate. 28 U.S.C. §157(b)(2)(B); *See* In re UAL Corp., 310 B.R. 373, 377 (Bankr. N.D. Ill. 2004) ("It has long been recognized that one of the essential, 'core' functions of bankruptcy is the allowance or disallowance of claims against the debtor's estate, without regard to the source of the claim."); United States v. Rhodey *(In re* R & W Enters.), 181 B.R. 624, 643 (Bankr. N.D. Fla. 1994) ("The process of claim determination and payment is within the exclusive province of the bankruptcy court."); In re Chateaugay Corp., 111 B.R. 67, 71 (Bankr. S.D.N.Y. 1990) (recognizing that restructuring of debtor-creditor relations is at the core of bankruptcy court power and that the court has jurisdiction to allow, disallow, liquidate and estimate aspects of claims based on contract law).

Although equitable subordination is not included in the non-exclusive list of core proceedings given in 28 U.S.C. §157(b)(2), it is a cause of action created by the Bankruptcy Code (11 U.S.C. §510(c)) and, being "a right created by federal bankruptcy law, it is a core proceeding," Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987) is clearly core; *see also In re* Bill Cullen Elec. Contracting Co., 160 B.R. 581, 584-5 (Bankr. N.D.Ill. 1993); CDX Liquidating Trust v. Venrock Assocs., No. 04 C 7236, 2005 U.S.Dist. LEXIS 16704, at *6 (N.D.Ill. August 10, 2005).

Count II of the Complaint appears to be a core proceeding for several reasons. Count II is a compulsory counterclaim to TSC's claims, having arisen out of the same sequence of events leading to TSC's spinoff of Debtors. Compare *In re* Iridium, 282 B.R. 822. Further, upon recharacterization of certain advances by TSC to Debtors as equity contributions, Debtors and the Committee seek recovery in Count II under a

fraudulent transfer theory, and Count II is thus subject to bankruptcy court jurisdiction on the same bases as Count I. Finally, the Complaint, in the alternative, asserts that the distributions described in Count II were illegal dividends under Delaware law. (8 Del. C. §170). Such distributions are property recoverable for the benefit of Debtors' estates and thus are core in that recovery would occur pursuant to 11 U.S.C. §544(b). *Cf. Matter of* Gribbin Supply Company, Inc., 371 F. Supp. 664 (N.D. Tex. 1974) (recovery under TEXAS BUS. CORP. ACT of bankrupt's payment to repurchase its shares).

While there is more doubt in my mind whether Count III, alter ego, would be core absent TSC's filed claims, an argument can be made that a determination of alter ego, as in context of the case at bar, amounts to a determination of who is the debtor and what assets comprise the estate available to satisfy creditors. *See* S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc., 817 F.2d 1142, 1152 (5th Cir. 1987) ("[A]n alter ego remedy applies when there is such an identity or unity between a corporation and . . . another entity such that all separateness between the parties has ceased and a failure to disregard the corporate form would be unfair or unjust."). An alter ego determination fits

well with the core jurisdiction assigned to the bankruptcy court, which has the authority to decide who is a debtor and what is property of the estate.[13]

Alternatively, the alter ego claim clearly arises from the same transactions attacked in other counts in the Complaint and is a compulsory counterclaim to the claims of TSC. *See* Centre Strategic Inv. Holdings, Ltd. v. Official Comm. of Unsecured Creditors of SLP, LLC (*In re* Senior Living Props., LLC), 294 B.R. 698, 702 (Bankr. N.D. Tex. 2003) (holding plaintiff's alter ego claim to be a core proceeding based upon the court's finding that it was in substance a counterclaim to the defendant creditor's proof of claim because, if successful, the defendant's claim would be disallowed or offset); *see also* Iridium, 285 B.R. at 830 ("Traditionally non-core claims against a creditor in an adversary proceeding will be considered core if…the claim arises out of the same transaction as the creditor's proofs of claim or set-off claim.")**.**

Turning to Count IV of the Complaint, if this claim is core, it is so because it is a counterclaim to TSC's claims. 28 U.S.C. §157(b)(2)(C) provides that counterclaims to claims are core proceedings. Congress did not specify whether a counterclaim, to be a core proceeding, had to be a compulsory counterclaim – though this was an issue of some significance under the former Bankruptcy Act.[14] In light of Katchen v. Landy, 382 U.S.

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13 A determination of what is property of the estate is a prerequisite finding in connection with determining applicability of several of the listed categories of core proceedings, for example, sections 157(b)(2)(E) (turn over of property of the estate), 157(b)(2)(K) (priority of liens on property of the estate), 157(b)(2)(M) and (N) (use, lease, or sale of property of the estate). The identity (or nature) of the debtor, if at issue, must be determined in connection with discharge, involuntary bankruptcy, scope of the automatic stay, and numerous other core proceedings. Indeed, the duty of the bankruptcy court to determine, in the first instance, whether or not a matter is core (28 U.S.C. § 157(b)(3)) cannot be performed without the ability, as part of that determination, to determine what is property of the estate and who is the debtor.

14 Under the former Bankruptcy Act, bankruptcy proceedings were divided into two types of actions:

323 (1966), it would not be unreasonable to give section 157(b)(2)(C) its plain meaning and consider Count IV as core simply by virtue of its being a counterclaim.

Even if a section 157(b)(2)(C) is not given so expansive a reading, Count IV arises from the same chain of events as the other counts in the Complaint. Thus, it is a counterclaim arising from the same transactions as TSC's claims. It is also sufficiently intertwined with the other counts in the Complaint that it would best serve the interests of justice for it to be tried with them. *See* Iridium, 285 B.R. at 830.

B. Jury Demand

A jury demand, if the party is entitled to a jury, automatically requires withdrawal of the reference. Any right TSC might have had to a jury trial, however, was lost upon filing of its claims. Langenkamp v. Culp, 498 U.S. 42 (1990); *In re* Jensen 946 F.2d 369, 374 (5th Cir. 1991); *In re* Efficient Solutions, Inc., 2000 U.S. Dist. LEXIS

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summary

and plenary. Matters falling under the bankruptcy court's summary jurisdiction were tried by the bankruptcy referee without a jury. Under the Act, courts uniformly held that if a creditor filed a claim against the bankruptcy estate, he had impliedly consented to the bankruptcy court's summary jurisdiction with regard to any compulsory counterclaim that a party might file, but there was uncertainty as to whether such a filing subjected the creditor to the bankruptcy court's summary jurisdiction with regard to any permissive counterclaims that might be filed against him. In enacting the Bankruptcy Code, Congress did away with the distinction between summary and plenary jurisdiction, choosing instead to grant bankruptcy courts the power to hear all "core proceedings arising under title 11, or arising in a case under title 11." (28 U.S.C. § 157(b)(1)). "[C]ounterclaims by the estate against persons filing claims against the estate" are expressly defined by Congress as "core proceedings" in 28 U.S.C. §157(b)(2)(C). One could argue that Congress, in choosing to define "counterclaims" rather than "compulsory counterclaims" as core proceedings under the Code, intended to eliminate the uncertainty that existed under the Act by making clear that a creditor who files a proof of claim against the bankruptcy estate is subject to the bankruptcy court's jurisdiction on any counterclaims that may be filed against him, not merely compulsory ones. *See* 2 COLLIER ON BANKRUPTCY, ¶ 23.08 (14th ed. 1976); 1 COLLIER ON BANKRUPTCY, ¶ 3.02[3][d][i] (15th ed. rev. 2005).

18794, at *18 ("[The creditor] therefore lost its right to a jury trial…by filing a proof of claim in the bankruptcy court."); Smith-Lyon v. Trustmark Nat'l Bank (*In re* Gunsmith's, Inc.), 271 B.R. 487, 490 (S.D. Miss. 2000) ("Of course, [the defendant], having filed proofs of claim in the plaintiffs' bankruptcy proceeding, may not now insist upon a jury trial.").

TSC's reading of *Langenkamp* and its assertion that it is entitled to a jury trial even in fraudulent transfer actions under Granfinanciera v. Nordberg, 492 U.S. 33 (1989) are simply wrong. *Granfinanciera* recognized that a creditor submitting a proof of claim would lose its right to a jury trial on a fraudulent transfer claim (492 U.S. at 59). *Langenkamp*, though it involved a preference action, confirmed that submission of a claim would cost a creditor the right to jury trial through submission to bankruptcy court jurisdiction (498 U.S. at 44-5). *See, also In re* Stansbury Poplar Place, Inc., 13 F.3d 122, 126 (4th Cir. 1993) (recognizing that, by filing a proof of claim, a creditor loses his right to a jury trial on a fraudulent conveyance action); Turner v. Davis, Gillenwater, and Lynch (*In re* Investment Bankers), 4 F.3d 1556, 1561 (10th Cir. 1993) (finding trial to bankruptcy court of fraudulent transfer claims to be proper where defendant creditor has filed a claim against the estate); Glinka v. Abraham & Rose Co., No. 2:93-CV-291, 1994 U.S. Dist. LEXIS 21328, at *35 (D.Vt. June 2, 1994) ("…by filing proof of claim, [a creditor] has submitted to the claims allowance process and is not entitled to a jury trial with respect to pre-petition fraudulent transfers…"); Official Employment-Related Issues Committee of Enron Corp. v. John J. Lavorato (*In re* Enron Corp.), 319 B.R. 122, 125 (Bankr. N.D.Tex. 2004) (citing *In re* Jensen for proposition that, by filing a proof of claim, a creditor waives his right to a trial by jury on an avoidance action); Malloy v. Zeeco, Inc. (*In re* Applied Thermal

Sys.), 294 B.R 784, 790-1 (Bankr. N.D.Okla. 2003) (recognizing that by filing a claim against the bankruptcy estate, a creditor loses his right to a trial by jury on a fraudulent transfer action).

TSC's reliance on Germain v. Connecticut Nat'l Bank, 988 F.3d 1323 (2d Cir. 1993) and *In re* Crown Vantage, Inc., No. C 02-0386, 2002 U.S. Dist. LEXIS 26109 (N.D. Cal. 2002) is misplaced. In each of these cases, it was the estate-representative plaintiff that asserted a right to a jury trial – not a claimant in the case. Moreover, as each court acknowledged (*Germain*, 988 F.2d at 1330; *Crown Vantage* 2002 U.S. Dist. LEXIS 26109, at *12), its decision was inconsistent with *In re* Jensen, 946 F.2d 369. The Fifth Circuit Court of Appeals in *Jensen* held that an estate representative (in *Jensen* the debtors) was entitled to a jury in a suit against a creditor that did not file a claim. The *Jensen* Court stated (946 F.2d at 374) that filing a proof of claim by the creditor would waive both the creditor's and the debtor's right to a jury trial. *Germain* and *Crown Vantage* rejected the Fifth Circuit's view that the filing of a claim by a creditor could eliminate *an estate representative's* right to a jury. As TSC has filed claims, is defendant in the adversary proceeding and is the party seeking a jury trial, *Germain* and *Crown Vantage* are inapposites. TSC is not entitled to a jury trial of Counts I and II.

Nor is TSC entitled to a jury trial on the alter ego count. Even if the alter ego count were addressed as an independent claim rather than as a counterclaim (and thus was not a core proceeding), a claim of alter ego is equitable in nature. S.I. Acquisition, 817 F.2d at 1152 and 1153. As this claim is equitable TSC has no right to have it heard by a jury. *See* Granfinanciera, 492 U.S. at 41-2; U.S. v. McMahan, 556 F.2d 362, 365 (5th Cir. 1977) (finding defendant has no right to jury trial on claims found to be equitable in nature); Gefen v. U.S., 400 F.2d 476 (5th

Cir. 1968) (same).

This leaves Count IV,[15] the aiding and abetting breach of fiduciary duty count, as the only one as to which TSC might be entitled to a jury. Even if that cause of action is not core by reason of section 157(b)(2)(C), it is clearly intertwined with the other counts of the Complaint; Count IV is simply an alternative theory for recovery that depends on the same facts as the fraudulent transfer, equitable subordination and claim objection counts. A separate trial by jury for Count IV is not, in these circumstances, appropriate. *See* Adelphia Communs. Corp. v. Rigas *(In re* Adelphia Communs.), No. 02-41729, 2003 U.S. Dist. LEXIS 9349, at *7 (S.D.N.Y. June 3, 2003) (holding that the interrelation of the defendant creditor's core and non-core claims justified trying all of them together in the bankruptcy court); *In re* Efficient Solutions, 2000 U.S. Dist. LEXIS 18794, at *15 (same); *In re* Iridium, 285 B.R. at 834.

C. Judicial Economy

TSC justifies withdrawal of the reference in part by arguing that withdrawal, followed by a transfer of the adversary proceeding to the United States District Court for the Northern District of Georgia, would allow coordinated administration with suits presently pending in that court. Even assuming that venue were transferred, I question whether the adversary proceeding and the pending Georgia suits – brought under securities laws and ERISA – have very much in common.

[15] Counts V and VI involve exercise of the bankruptcy court's power to allow and disallow claims, and so are not appropriate for trial by jury.

On the other hand, Debtors and the Committee have obtained waivers of limitations from a number of entities, including Troutman, the investment bankers used in the 2000–2001 divestiture of Debtors by TSC and individuals who served as officers or directors of Debtors or TSC at that time. Like TSC, some of these entities have filed claims in these chapter 11 cases and so have submitted to bankruptcy court jurisdiction. If, as is certainly possible, some of these entities are sued by Debtors or the Committee, the causes of action are likely to involve many of the same facts as are alleged in the Complaint. Thus, withdrawal of the reference as to TSC will likely require the same action in subsequent suits. This will, ultimately, limit the bankruptcy court's ability to deal with a number of claims related to the transactions attacked in the Complaint.

There are other reasons why the need for judicial economy would not favor withdrawal of the reference. Present and past insolvency of Debtors will have a major impact on the result in the adversary proceeding as well as in other, unrelated voidable transfer suits. Control over the suit against TSC will be exercised by a trust supervised by the bankruptcy court. *See* Plan § 9.2. The equitable subordination count (and the alter ego count) in the Complaint will potentially affect the claims allowance process and the restructure of the debtor-creditor relationship.

D. Forum Shopping

TSC asserts that the Motion is not motivated by forum shopping (Motion, pp 19-20). Even accepting that statement as true, TSC's conduct has the appearance of forum shopping.

E. Uniformity in Bankruptcy Administration

While withdrawal of the reference and transfer of the adversary proceeding to Georgia could lead to inconsistent findings (*e.g.*, regarding solvency), granting the Motion would not adversely affect the uniform administration of bankruptcy cases generally.

F. Debtors' and Creditors' Resources

TSC argues that witnesses in the litigation pending in Georgia as well as in the adversary proceeding are mostly located in Georgia. Debtors and the Committee contest that position. It is likely that resources of both TSC and Debtors' estates would be conserved by coordinating adjudication of the Complaint with claim objections and other matters that will be before the bankruptcy court. Nevertheless, I do not believe this factor favors grant or denial of the Motion.

G. Expediting the Bankruptcy Process

It is not clear at this time how progress of these chapter 11 cases would be affected by grant or denial of the Motion. Accordingly, I do not believe that this factor is relevant in deciding whether to grant or deny the Motion.

III. Conclusion

For the foregoing reasons, I conclude that TSC has not satisfied its burden.[16] The *Holland* factors either support retention of the adversary proceeding before the bankruptcy court or are not relevant to a decision on the Motion. TSC's participation in

[16] The burden in justifying grant of a motion to withdraw the reference is on the movant. *See In re* U.S. Airways Group, Inc., 296 B.R. 673, 677 (E.D.Va. 2003); NDEP Corp. v. Handl-It, Inc. (*In re* NDEP Corp.), 203 B.R. 905, 907 (D.Del. 1996).

the underlying chapter 11 cases, added to TSC's filed claims, amounts to a clear submission to bankruptcy court jurisdiction. I therefore recommend that the Motion be denied.

Signed this the 31st day of August 2005.

Respectfully submitted,

Signed electronically

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Dennis Michael Lynn
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF TEXAS
501 WEST TENTH STREET, ROOM 128
FORT WORTH, TX 76102-3643

CHAMBERS OF
DENNIS MICHAEL LYNN

U.S. BANKRUPTCY JUDGE

Telephone: (817) 333-6020

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March 1, 2005

Evelyn Biery
FULBRIGHT & JAWORSKI, LLP
1301 McKinney 41st Floor
Houston, TX 77010

Re: *Mirant Corporation, et al*; Case No. 03-46590

Dear Ms. Biery:

Following last Wednesday's hearing, during which I indicated concerns about investigation and pursuit of possible claims (the "Claims") by the referenced Debtors against your client, The Southern Co. ("TSC"), I gave further thought to the issues raised by you at that time. I have now concluded that you were correct in urging that TSC should be able to participate in any conference respecting the Claims supervised by me. I also concur that TSC should have access to any substantive information respecting the Claims which has been provided to the court.

Turning first to the latter concern, I am enclosing the portion of the Examiner's Fourth Interim Report in which the Claims are discussed. As you can see, the discussion relates solely to the mechanics and conduct of Debtors' investigation of the Claims rather than to the substance or merit of the Claims. It is my recollection that prior reports by the Examiner similarly were limited to Debtors' investigative procedures and did not address the nature of validity of the Claims.

For a variety of reasons, I continue to believe that it is necessary to have evaluated the

efficiency and effectiveness of Debtors' control over the Claims. Besides the relationships between Debtors and their officers and directors on the one hand and TSC on the other and the looming Bankruptcy Code § 546(a) statute of limitations, I am troubled by the potential effect of orders entered *sua sponte* which protect Debtors' management and professionals from suit for actions taken during Debtors' chapter 11 cases. Specifically, some might argue that, nothwithstanding their merit, the Claims, if not pursued, were wrongfully abandoned in part because professionals and management were protected in any malfeasance by those orders.

I want to stress that I am *not* suggesting that Debtors would, in fact, fail to pursue the Claims, if they have merit. Rather, I am concerned about any appearance that Debtors under the court's protection, allowed valid causes of action to lapse. It is especially important, given that TSC controlled Debtors when they entered into many of the transactions which contributed to the need for bankruptcy relief, that there be no doubt among creditors, equity owners and the general public that the Claims have been fully investigated and, if warranted, pursued.

That said, if I am to try any of the Claims (if they are brought), I do not believe it would be appropriate for me to preside over any hearing that would affect investigation or control of Claims. This would be particularly true if the hearing were not open to TSC, an option which ought to be available to Debtors and other interested parties. I have therefore asked Hon. Steven Felsenthal to assume responsibility for the status conference I mentioned last Wednesday and other proceedings ensuring proper evaluation and, if appropriate, prosecution of the Claims. I would anticipate that Judge Felsenthal would also consider any request by TSC to review additional parts of the reports of the Examiner. I believe Judge Felsenthal's involvement will provide assurance that the Claims are handled as they should be without risking my impartiality.

By copy of this letter I would ask the Examiner to coordinate with Debtors and other parties in interest and arrange with Judge Felsenthal's Courtroom Deputy (Traci Davis at (214) 753-2054 or Traci_Davis@txnb.uscourts.gov <mailto:Traci_Davis@txnb.uscourts.gov>) for an initial status conference. Ms. Davis is currently holding time on March 30th for that purpose. Should Judge Felsenthal, with input from the parties, determine further hearings necessary, I assume he will schedule them. Should Judge Felsenthal determine a change in control of the Claims is necessary, I anticipate he will enter appropriate orders.

Sincerely,
Original signed by

D. Michael Lynn

DML:bj
Enclosure